# In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-5887

ARDELIA TERRELL, *Et Vir*,

*Petitioner*,

vs.

RAUL G. GARCIA, M. D.,

*Respondent*.

## BRIEF OF RAUL G. GARCIA, M.D. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS.

PAUL M. GREEN

LANG, CROSS, LADON, BOLDRICK & GREEN
1540 Milam Building
San Antonio, Texas 78205

*Counsel for Respondent,*
*Raul G. Garcia, M.D.*

December 27, 1973

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## BRIEF IN OPPOSITION

## ABSENCE OF JURISDICTION

Petitioner's federal constitutional claims were raised for the first time in the state courts upon motion for rehearing of the decision of the Texas Supreme Court refusing an application for writ of error to the Fourth Court of Civil Appeals. Accordingly, this Court should decline jurisdiction of the

Petition for Writ of Certiorari. *Miller v. Texas* (1894), 153 U.S. 535; *Waters-Pierce Oil Co. v. Texas* (1909), 212 U.S. 112. In accord with state practice the Texas Supreme Court overruled petitioner's motion for rehearing without opinion. Such order does not imply a consideration of Petitioner's federal constitutional claims by the Texas Supreme Court so as to give this Court a basis for review by way of certiorari. *McCorquodale v. Texas* (1908), 211 U.S. 432.

## PETITIONER'S CONSTITUTIONAL CLAIMS HAVE NO MERIT

The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, in a decision which the Texas Supreme Court declined to review, has held that the cost of care and maintenance of a healthy, normal but unwanted child, born following a sterilization procedure upon one of his parents, is not a recoverable element of damages in a malpractice action by the parents against the allegedly negligent physician. It did not hold that Petitioners had no cause of action against Respondent. Petitioners have no vested right in a particular form of remedy. *Gibbes v. Zimmerman* (1933), 290 U.S. 326. The right to equal protection of the laws is not denied where the same law would be applied to any other person in the State of Texas under similar circumstances and conditions. *Tinsley v. Anderson* (1898), 171 U.S. 101. Petitioners assert lack of due process but the record raises no inference thereof.

Petitioners' authorities are not in point or superfluous. *Barbier v. Connolly* (1885), 113 U.S. 27, upheld the validity of a municipal ordinance regulating

laundries. That state action prohibited by the Fourteenth Amendment can emanate from the state court system is conceded; therefore, the citation of *National Association for the Advancement of Colored People v. State of Alabama* (1958), 357 U.S. 449, is unnecessary.

## CONCLUSION

The Petition should be dismissed or, in any event, the writ should be denied.

Respectfully submitted,

PAUL M. GREEN

LANG, CROSS, LADON,
BOLDRICK & GREEN
1540 Milam Building
San Antonio, Texas 78205

*Counsel for Respondent,*
*Raul G. Garcia, M.D.*

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